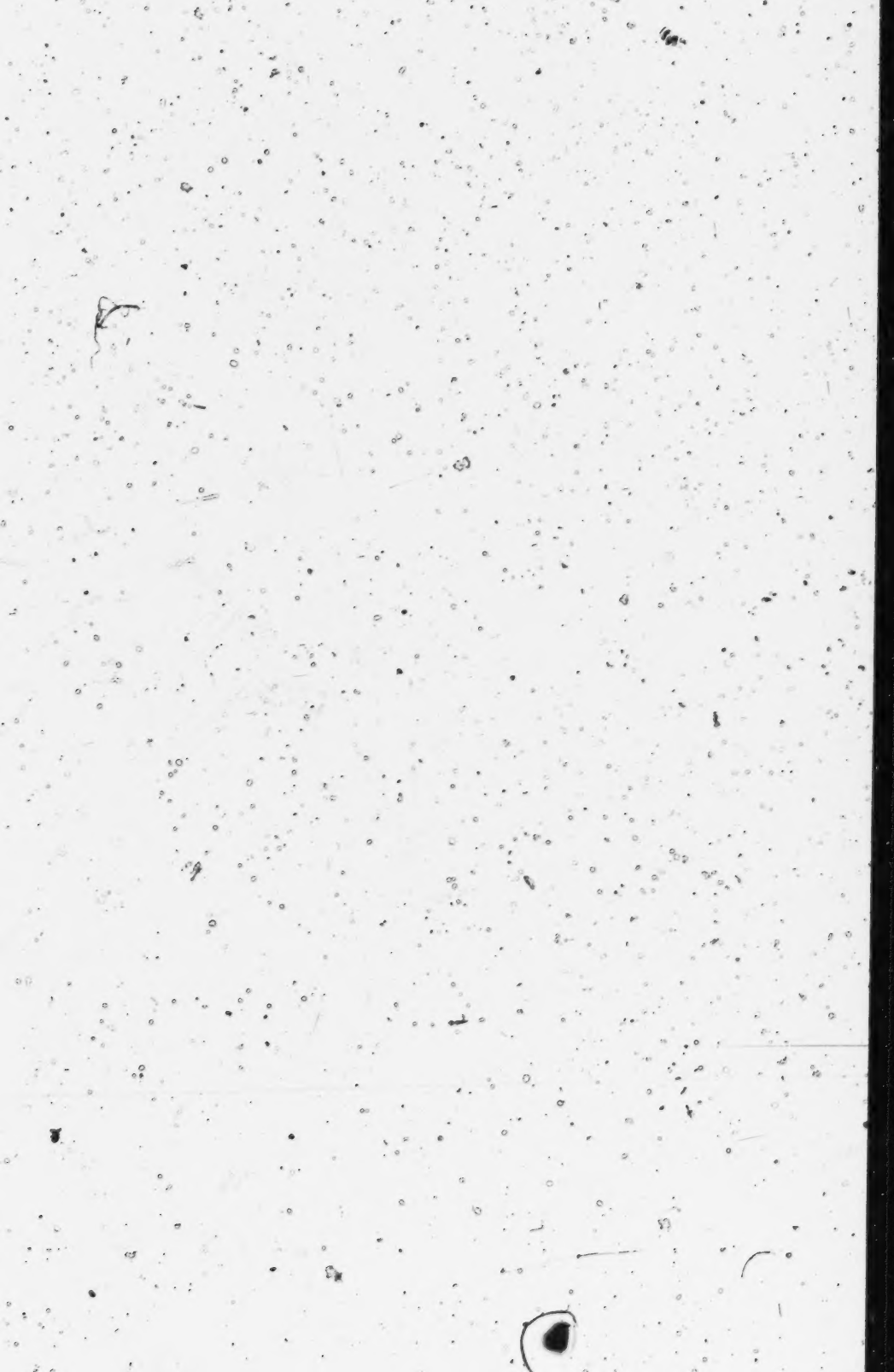


21500P



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

**STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL,
PETITIONER**

v.

THE UNITED STATES OF AMERICA

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to the request of the Court on November 10, 1938, at the oral argument of this case, the following letter was sent by the Solicitor General to the Secretary of the Interior:

**OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C., November 10, 1938.
The Honorable, The SECRETARY OF THE
INTERIOR,
Washington, D. C.
MY DEAR MR. SECRETARY:**

**In re: Minnesota v. United States. United
States Supreme Court, October Term,
1938, No. 73.**

**In the course of the argument of the above
entitled case in the United States Supreme**

Court today, the Court requested to be advised with respect to the administrative practice of your Department concerning condemnation of allotted Indian lands for highway purposes.

An important question in the case is the proper construction of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083.

Section 3, paragraph 2, provides:

"That lands allotted in ~~severalty~~ ^{severalty} to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Section 4 provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation."

The Government took the position that although Section 3 may express the consent of the United States to proceedings for the condemnation of allotted Indian lands, Section 4 contains an overriding qualification in the

case of condemnation for highway purposes, namely, that the Secretary of the Interior approve the establishment of a highway, i. e., approve the idea of and location of the proposed road.

The State of Minnesota took the position that Section 3 authorizes the condemnation of Indian lands by the states without regard to the approval of the Secretary of the Interior. Its brief states in part (see pp. 22-23):

"For example, the State of Minnesota by its Attorney General during the past ten years has successfully concluded six separate condemnation proceedings for highway purposes for the taking of lands allotted in severalty to individual Indians. These proceedings were instituted and completed in the State courts and included land in Carleton, Itasca, Cass, St. Louis, and Becker Counties and involved the taking for trunk highway purposes of 79 separate parcels of allotted Indian lands. In all of these condemnation proceedings the individual Indians were named as respondents, as well as the Indian Superintendents. The Department of Interior likewise in these cases fully cooperated with the State in conformity with the established practice and procedure and regulations of said Department concerning the acquirement of right of way for public purposes through such allotted lands, pursuant to the rules and regulations of the Department of Interior heretofore referred to (Regulation 70, supra, Department of In-

terior). It is pointed out and stressed that the present proceeding is in all respects similar to the other six condemnation actions. The instant case marks the first time in which the United States through the Department of Interior has objected in any wise or manner to the acquirement of right of way for a state and national trunk highway through allotted Indian lands.

"In none of these cases was the express consent of the Secretary of Interior obtained, which the Circuit Court now holds to be necessary (R. 90). The State, therefore, in accordance with the Department of Interior's regulations 68 and 69, supra, conducted its condemnation proceedings pursuant to Section 357, which proceedings, the regulations state, are authorized by such section and that any purpose for which private lands could be condemned under state laws is held to be a public purpose within the meaning of said Section 357."

The Court requested that it be advised by November 15, 1938, of the actual practice with respect to the condemnation of allotted Indian lands for highway purposes.

It would be appreciated, therefore, if you would advise this Department, as soon as possible, with respect to the following matters:

1. Prior to the present proceeding, have any allotted Indian lands been condemned under the laws of a State or Territory for highway purposes?

If so, with respect to each condemnation proceeding—

2. In what court was the proceeding brought?

3. Was the United States or any Government official made a party defendant?

4. What was the outcome of the proceeding?

5. At what stage of the proceeding was the Secretary of the Interior advised thereof?

6. If the Secretary of the Interior gave his permission to the establishment of the road, at what stage of the proceeding and in what form was such permission given?

7. If no such permission was given, did the Secretary of the Interior express any objection to the proposed highway?

8. What has been the position of the Department with respect to such proceedings?

Respectfully yours,

ROBERT H. JACKSON,
Solicitor General.

The following reply to the foregoing letter has been received:

UNITED STATES DEPARTMENT

OF THE INTERIOR,

OFFICE OF THE SECRETARY,

Washington, November 14, 1938.

The Honorable THE ATTORNEY GENERAL.

In re: *Minnesota v. United States*, No. 73,

U. S. Sup. Ct., Oct. Term, 1938.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to the Solicitor General's let-

ter of November 10, requesting certain information concerning the condemnation of restricted allotted Indian lands under the Act of March 3, 1901 (31 Stat. 1058, 1083).

Careful examination has been made of all the files available to this Department within the limited time indicated by your letter. These cover only cases since 1906, when the present filing system with index cards was instituted.

Three cases have been found involving the construction of highways across allotted Indian lands in Minnesota.

(1) In 1932 a proceeding was brought in a state court in Cass County, Minnesota, to condemn allotted Indian lands for highway purposes in that county. The Superintendent of the Indian Agency was joined as a party defendant. This Department took the position that the proceeding in the state court was a nullity; and that any condemnation proceedings by the State had to be brought in Federal Court, and the United States joined as a party defendant. Eventually, the State requested the permission of the Secretary of the Interior for the opening of the road under Section 4 of the Act of 1901, and a right of way was granted on the regular form used for the purpose. The files do not specifically indicate whether the state proceedings were dismissed.

(2) A second suit to condemn allotted Indian lands for highway purposes was brought in 1932 by the State of Minnesota in the state court in St. Louis County. The

7

Superintendent of the Agency was joined as a party defendant to this suit. However, contrary to his instructions, he neglected to inform the Washington Office of the Department of the Interior of the suit until after its termination. This Office again took the position that the suit should have been brought in a federal court, and the United States made a party. Thereafter the State applied to the Secretary of the Interior for permission to open the highway and the Secretary granted a right of way.

(3) In 1933 the Superintendent of the Consolidated Chippewa Agency brought to the attention of the Commissioner of Indian Affairs the fact that the State of Minnesota had constructed, in 1930, a public highway across five restricted Indian allotments, in Itasca County. The road had been constructed without either application to the Secretary of the Interior for right of way, or, apparently, condemnation proceedings. The Superintendent was advised by the Commissioner of Indian Affairs that it would be necessary for the State to procure a right of way by application to the Secretary of the Interior. After negotiation, the State Highway Commissioner formally submitted application for right of way under the Act of 1901 and that application was approved by the Assistant Secretary of the Interior.

Research in the Department's records has not disclosed any case in which the State of Minnesota has acquired title to restricted

allotted lands, for highway purposes, by virtue of its condemnation proceedings. If such proceedings took place, and the superintendents of the agencies were notified, they neglected to advise the Washington Office of the Department thereof.

The following summarizes the contents of the files of the Department with respect to proceedings for the condemnation of allotted Indian lands in states other than Minnesota.

(1) In 1910 a condemnation suit was filed in an Idaho State court for the condemnation of lands included in six Indian allotments. Neither the United States nor the Secretary of the Interior was made a party to the proceeding. It was reported to the Secretary of the Interior that the proceedings involved the acquisition of land for a public highway, and May 13, 1910, this Department suggested to the Attorney General that instructions be issued to the United States Attorney to resist the proceeding on the ground that restricted allotted lands were not subject to condemnation under the Act of March 3, 1901. On May 16, 1910, the Attorney General advised the Secretary of the Interior that the United States Attorney would be instructed to challenge the jurisdiction of the court on the ground that Section 4, of the Act of 1901, placed the matter entirely under the Secretary of the Interior. It later developed that the suit did not involve the acquisition of a public highway but was confined to condemnation of the lands for a building site.

(2) In 1926 Oklahoma applied to the Secretary of the Interior, under Section 4 of the Act of March 3, 1901, for permission to open a public highway across certain Kiowa restricted allotted lands. The Department officials expressed considerable objection to the location, and the State officials relocated the proposed highway in order to meet these objections. Subsequently the State officials, complaining of the Department's appraisal of value, instituted condemnation proceedings in a state court, and served notice on officials of this Department. Before further proceedings were had, state officials agreed in substance to this Department's appraisal, an amicable settlement was reached, and permission was subsequently granted by the Secretary of the Interior under Section 4 of the Act of March 3, 1901.

(3) Proceedings to condemn allotted Indian lands for a highway were filed in an Oklahoma state court in 1927. It does not appear from the files who were served as parties defendant, although it does appear that the Secretary of the Interior had immediate notice of the suit. The Secretary took the position that the suit must be brought in federal court, with the United States joined as party defendant. Subsequently, the Secretary granted a right of way under Section 4 of the Act of 1901 and the state court proceedings were dismissed.

(4) A proceeding to condemn allotted Indian lands for highways was filed in an Okla-

homa state court in 1929. Only the Indian allottees were joined as parties defendant. The permission of the Secretary of the Interior under Section 4 of the Act of March 3, 1901, had been asked and refused before the suit was brought. The Secretary took the position that the suit should have been brought in the federal court and the United States joined as a party. This suit was eventually dismissed by the State because it determined to relocate the proposed highway.

(5) In 1929 condemnation proceedings were instituted by the State of Washington to condemn for highway purposes the right of way across four Indian allotments on the Spokan Indian Reservation. The United States was made a party to the suit, and the suits removed to the federal court. The jury made awards regarded by the Attorney General as very liberal.

(6) Five suits to condemn land included in Indian allotments were instituted in a Washington state court in 1931. The file does not show whether the Secretary of the Interior or the United States was named as a party. The Superintendent notified this Department of the pending cases. In 1932, the First Assistant Secretary of the Interior advised the Attorney General of this litigation and stated that the Department of the Interior, as it had informed the Attorney General in connection with other similar cases some years before, took the position that a state court had no jurisdiction over a

suit to condemn restricted Indian lands, that the United States was an indispensable party to such a suit, and that such a suit must be brought in a federal court. In reply the Department of Justice advised that the United States Attorney had been instructed to appear in the state court proceeding and suggest that the United States was a necessary party and that the court had no jurisdiction. Subsequently, the State filed an application and on March 19, 1932, the Secretary of the Interior granted the right of way pursuant to Section 4 of the Act of 1901.

(7) In 1932 the State of Wisconsin proposed to secure a right of way across Indian allotments by condemnation. However, before any proceeding was brought, negotiations between the State and the Secretary of the Interior resulted in the granting of a right of way by the Secretary, under Section 4 of the Act of 1901. In the correspondence relative to the proposed condemnation the Secretary took the position that any suit must be brought in the Federal court, with the United States as an indispensable party thereto.

(8) A proceeding to condemn allotted Indian lands was commenced in an Oklahoma state court in 1937. Only the Indian allottees were joined as party defendants. This suit is still pending and action on it has by agreement been held up awaiting the determination of *United States v. Minne-*

sota, now pending in the United States Supreme Court.

It is hoped that the foregoing presents the information requested by the letter of your Department. The examination made of the files of this Department does not indicate any basis for the statements made in the brief of the State of Minnesota at pp. 22-23, and quoted in the letter of your Department, to the effect that the State of Minnesota during the past ten years has successfully concluded six separate condemnation proceedings for the taking for highway purposes of lands allotted in severalty to individual Indians (if the statement in the brief of the State of Minnesota is taken to refer to restricted or trust allotments, rather than unrestricted lands); and to the effect that this Department cooperated with these proceedings in conformity with its established practice and procedure. It cannot be said that the instant case marks the first time in which the United States has objected in any manner to the acquirement of right of way for a state highway through allotted Indian lands.

Since the only issue raised with respect to state condemnation of restricted Indian lands relates to the departmental practice, it has seemed unnecessary to attempt to secure from the individual superintendents of the several Indian reservations instances which they may recollect of condemnation proceedings, if any exist, which have not been reported to the Department in Wash-

ington; nor would such an inquiry have been practicable within the limited period of time.

Respectfully yours,

OSCAR L. CHAPMAN,

Assistant Secretary of the Interior.

It is hoped that this letter furnishes the information sought by the Court. The Government will be pleased to endeavor to supply any additional or supplemental information which may be desired by the Court.

Respectfully submitted.

ROBERT H. JACKSON,

Solicitor General.

CARL MCFARLAND,

Assistant Attorney General.

MAC ASBILL,

Special Assistant to the Attorney General.

NOVEMBER 1938.